CHESAPEAKE BAY FOUNDATION
Saving a National Treasure

November 8, 2010

The Honorable Lisa P. Jackson
Administrator
U. S. Environmental Protection Agency
Water Docket, Mailcode: 28221T
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: Chesapeake Bay TMDL -- Docket no. EPA-R03-OW-2010-0736

Dear Administrator Jackson:

On behalf of the Chesapeake Bay Foundation's (CBF) more than 200,000 members, many of whom live, recreate and work along the shorelines of, or in the waters of, the Chesapeake Bay and its tributaries, including those waters designated as impaired under Section 303 of the Clean Water Act (CWA), please accept this letter and its attachments as formal comment on the Draft Chesapeake Bay Total Maximum Daily Load (TMDL). Incorporated herein by reference, also, are the comments submitted on November 8, 2010 by the Choose Clean Water Coalition as well as those submitted by Donald Boesch, *et al.*

First of all, we want to acknowledge and thank the many dedicated Environmental Protection Agency (EPA) staff who have been working, since 2005, on the development of this TMDL. CBF has been an active participant in this process and can attest, firsthand, to the scientific integrity, transparency, and fairness of this process. In particular, we want to acknowledge Bob Koroncai and Rich Batiuk for their extraordinary efforts in guiding this work. They have displayed, through their leadership of the Water Quality Goal Implementation Team during the last five years of meetings and conference calls, the best of what government can be by ensuring openness and responsiveness throughout the process. We also thank them for the innumerable hours, starting in fall of 2009, spent traveling across the Chesapeake's watershed to conduct public meetings on the proposed TMDL, educating the public and obtaining feedback from interested parties.

Given this extraordinary opportunity for public input on the development of the proposed TMDL, along with the long history of Chesapeake Bay restoration efforts and legal obligations to develop the TMDL, recent calls for an extension of the 45-day public comment period are disingenuous, at best. We wholeheartedly support EPA's decision to hold firm on its commitment, and that of the Bay jurisdictions, to complete the Bay TMDL by December 31, 2010, which is also legally supported by our recent settlement

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agreement with EPA in *Fowler v. EPA*. (Copy of the Notice of Intent of October 29, 2009, Complaint of January 5, 2009, and Settlement Agreement May 10, 2010, attached hereto and incorporated herein by reference.)

As you know, the process of developing the Bay-wide TMDL actually began over a decade ago with a series of federal judicial consent decrees and settlement agreements over impaired water listings for many watershed states. *See, e.g., American Canoe v. EPA*, 54 F. Supp. 2d 621 (E.D. Va. 1999). On June 28, 2000, the governors of Virginia, Maryland, and Pennsylvania, the chair of the Chesapeake Bay Commission, and the Mayor of the District of Columbia responded to the various decrees and agreements by signing, along with one of your predecessors, former EPA Administrator Carol Browner, the *Chesapeake 2000* agreement which, among other things, committed to reduce nitrogen, phosphorus, and sediment sufficiently to remove the Bay and its tidal tributaries from the impaired waters lists by 2010. In the fall of that same year, the governors of New York and Delaware signed a formal agreement to work with the other jurisdictions to "achieve the nutrient and sediment reduction targets…to achieve the goals of a clean Chesapeake Bay by 2010," with West Virginia following suit in 2002. In addition, as further described below, Congress amended and recodified the CWA to require the development of plans that would ensure attainment of the water quality goals, among others, memorialized in the *Chesapeake 2000* agreement. 33 U.S.C. § 1267(g).

In December 2003, the EPA, and other Bay jurisdictions agreed to nitrogen, phosphorus and sediment allocations that became the basis for "tributary strategies," plans designed to remove the Bay and its tidal tributaries from the impaired waters lists by 2010. This resulted in the release of the jurisdiction-specific "tributary strategies" between 2004 and 2006. However, by 2007 it became clear that by the 2010 timeframe, water quality of the Bay would not be restored, the impaired waters would not be de-listed, and—as a result of the failure to achieve that goal—the need to develop the Bay TMDL would arise. Since that time, all Bay jurisdictions have fully participated in the process of developing the Bay TMDL.

Since the signing of the first Chesapeake Bay Agreement in 1983, some progress has been made in implementing the practice needed to reduce nitrogen, phosphorus and sediment pollution. However, two recent studies indicate much remains to be done. A report by the U.S. Department of Agriculture highlights that although progress has been made on reducing pollution from farm fields through conservation practice implementation in the Chesapeake Bay region, a significant amount of conservation management remains to be done to reduce nonpoint agricultural sources of pollution[1]. This report also provides independent confirmation of the conclusions of the Chesapeake Bay watershed model with respect to estimates of pollution loads associated with the agricultural sector. A recent report by the U.S. Geological Survey similarly concludes

[1] USDA October 2010. Assessment of the Effects of Conservation Practices on Cultivated Cropland in the Chesapeake Bay Region

that progress in reducing actual pollution loads in the Chesapeake watershed, particularly in those systems dominated by nonpoint sources, is lagging. [2] The evidence is clear: our mostly voluntary efforts to date are woefully inadequate. We now have both a legal and moral imperative to move beyond 30 years of insufficient progress and unmet obligations and establish a new, enforceable blueprint for restoration. The key to success is the proposed Chesapeake Bay TMDL as described in EPA's "Accountability Framework."

EPA's Accountability Framework is Firmly Based on Its Authority Under the CWA

Section 303 of the CWA and the TMDL Regulations are Clear: TMDLs Shall be Set at a Level Necessary to Implement The Applicable Water Quality Standards.

The CWA triggers the need for a TMDL when efforts to meet water quality standards fail.[3] States are first required to set water quality standards for all waters within their boundaries. If the states do not set water quality standards, or the EPA determines that the standards do not meet the requirements of the Act, EPA will promulgate standards for the state. 33 U.S.C. §§ 303(b), (c)(3)-(4).

The CWA requires the establishment of technology-based controls on point sources; this occurs through the application of the "best practicable control technology" effluent limitations for most point source discharges. 33 U.S.C. § 1311(b)(1). When these technology-based controls are insufficient in meeting and maintaining water quality standards, the CWA requires the establishment of water quality-based controls under Section 303(d). Section 303(d)(1)(A) of the Act requires each state to identify waters within its boundaries when these water quality standards are not met for an applicable water segment. For these "impaired" waters, each state must then "establish . . . the total maximum daily load [TMDL], for those pollutants which the Administrator identifies . . . as suitable for such calculation." 33 U.S.C. § 1313(d)(1)(C). A TMDL is a specification of the maximum amount of a particular pollutant that can pass through a waterbody without water quality standards being violated. *Id.* at 1313(d)(1)(C). Such "load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge. . .." *Id.* These requirements apply to both point sources and nonpoint sources of pollution. *Pronsolino v. Nastri,* 291 F.3d 1123, 1139 (9th Cir. 2002). Once

[2] Hirsch, R.L., D.L. Moyer, and S.A. Archfield. 2010. Weighted regressions on time, discharge and season (WRTDS), with an application to Chesapeake Bay River inputs. Journal of the American Water Resources Association.

[3] There is no question that the states and EPA are required to establish TMDLs when triggered by the CWA. *See Natural Resources Defense Council v. Fox*, 909 F. Supp. 153 (S.D.N.Y. 1995) (EPA must establish TMDLs based on Congress' use of the word "shall" in section 303); *Alaska Center for the Environment v. Reilly*, 762 F. Supp. 1422 (W.D. Wa. 1991) (EPA has a mandatory duty to promulgate TMDLs).

EPA approves the 303(d) list and any associated TMDL,[4] the CWA requires that that state incorporate the list and TMDLs into its continuing planning process. *Id.* at § 303(d)(2).

Further, each state "shall have a [management plan]" that is consistent with the CWA and contains the "total maximum daily load for pollutants" and a provision for "adequate implementation, including schedules of compliance, for revised or new water quality standards." 33 U.S.C. §§ 1313(e)(3)(C), (F). The CWA regulations are also clear on this point as TMDLs are to be included as part of Water Quality Management Plans used to direct implementation. 40 C.F.R. Part 130.6(b), (c). Again, the use of the Water Quality Management Plans – that include TMDLs – are required in order to achieve the applicable water quality standards. The Bay TMDL, therefore, must be established and implemented with mandated steps to achieve the water quality standards.

As such, EPA must reject state submitted TMDLs that do not provide reasonable assurances they will "implement applicable water quality standards." 33 U.S.C. § 1313(d)(2). The goal of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Without question, these congressional goals will only be advanced if there are reasonable assurances of implementation of TMDLs to improve water quality. Courts have long recognized this principle. In *American Canoe Ass'n, Inc. v. EPA,* the Court-ordered schedule in the Virginia TMDL case "ensures that the CWA shall not be reduced to empty formalism." 54 F. Supp. 2d 621, 628 (E.D. Va. 1999). Similar court pronouncements on implementation of the CWA can be found elsewhere. *See Natural Resources Defense Council, Inc. v Texaco Refining & Mktg, Inc.,* 20 F. Supp. 2d 700, 708 (D. Del. 1998) (Court concluded that the public interest, as revealed by the "spirit and intent" of the CWA, would best be served by mandating the implementation of a monitoring program).

TMDLs are one of the very last lines of defense to improve water quality. The CWA calls for them when permits for point sources and controls for nonpoint sources fail to protect water quality. *See* 33 U.S.C. § 1313(d)(1)(A); 40 C.F.R. § 130.7(b)(1). If TMDLs fail, there are no other comprehensive pollution abatement programs under the CWA.[5] As such, and as required by the CWA, TMDLs must be established at a level necessary to meet water quality standards. In order to meet water quality standards, there must be "reasonable assurances" that TMDLs will be implemented both for point and nonpoint sources. Otherwise, Congress' goals in the CWA will never be achieved and the Bay TMDL will be little more than a lengthy exercise in re-stating much of what we already know.

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[4] Or, if the state fails to prepare an adequate TMDL, EPA can do so. *Scott v. Hammond*, 741 F. 2d 992 (7th, Cir. 1984) (holding that lengthy inaction on the part of a state can constitute a "constructive submittal" of an inadequate TMDL, thereby transferring the duty to prepare to EPA).

[5] The Administrator does retain residual designation and emergency powers authorities but there is no other comprehensive management program like the TMDL provisions.

A Bay Jurisdictions' Watershed Implementation Plan (WIP) Must Meet the Bay TMDL Allocations and Provide Reasonable Assurances

EPA is required to ensure that the Bay jurisdictions will meet their respective TMDL allocations. And the CWA provides the states with the responsibility of establishing to EPA's satisfaction how they will achieve those goals. EPA has executed these elements of the CWA by directing the states to develop Watershed Implementation Plans (WIPs)[6] that delineate how it will achieve the TMDL waste load and load allocations. *See* September 11, 2008 letter from the EPA to the Principals' Staff Committee. The requirement that Bay jurisdictions adopt an adequate WIP that implements the Bay TMDL, meets the Bay TMDL allocations, and includes reasonable assurances of point and nonpoint source pollution reductions is a crucial aspect of the Bay TMDL and its "accountability framework."[7]

The WIP fills several essential components of EPA's accountability framework. Together, the jurisdictions' WIPs are to meet – and not exceed – the Bay TMDL's total nutrient and sediment allocations. Individually, each jurisdiction's WIP must meet its allocations and sub-allocate them among point and nonpoint source sectors and individual permitted sources.[8] Further, while the WIP must identify specific actions and assurances, EPA's process has provided the states with a high degree of flexibility. For example, the WIP identifies specific actions and controls to be 60% implemented by 2017 and 100% implemented by 2025. The WIP must provide information concerning interim and final nutrient and sediment target loads; current loading baselines and program capacity (including current legal, regulatory, programmatic, financial, staffing and technical capacity to deliver the target loads); ways to address growth; an analysis of gaps in program capacity; commitments and strategies for filling the gaps; tracking and reporting protocols; contingencies for slow or incomplete implementation; and detailed targets or schedules. The states have the opportunity to adjust the WIP provisions at least every two years as it develops further information and assesses progress.[9] Thus, the WIP is a living, evolving document.

As previously noted, a WIP, as a CWA implementation tool, must provide reasonable assurances that the jurisdiction can and will achieve its TMDL allocations, both point and nonpoint source allocations. EPA has issued a plethora of guidance confirming that reasonable assurances are the binding, enforceable and/or incentive based tools that

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[6] In addition, the plan mandated by CWA Section 117(g), discussed below, can also be considered a fundamental element of the CWA Continuing Planning Process. *See Environmental Defense Fund v. Costle, 657 F.2d 275(D.C. Cir. 1981).*

[7] *See* Executive Order 13508.

[8] A state could assign all of its allocation to solely point sources, if it chose to do so, but if it were to do so, it would be unlikely, or impossible, for the state to achieve the total allocation. Thus, the WIP must address nonpoint source sectors. .

[9] *See* EPA correspondence to former Virginia Secretary of Natural Resources Preston Bryant, Jr., for the Chesapeake Bay Program Principals' Staff Committee (November 9, 2009), at 15.

demonstrate future attainment of water quality goals. For example, in 1991, EPA explained:

> "Assurances may include the application or utilization of local ordinances, grant conditions, or other enforcement authorities. For example, it may be appropriate to provide that a permit may be reopened for a WLA which requires more stringent limits because attainment of nonpoint source load allocation was not demonstrated. . . State nonpoint source management programs may include, as appropriate, non-regulatory or regulatory programs for enforcement, technical assistance, financial assistance, education, training, technology transfer, and demonstration projects.[10] The TMDL is established so that the statutorily-required water quality standards are achieved, reasonable assurances must be given that the nonpoint source load allocations will be achieved."[11]

EPA's 1997 TMDL guidance, "New Policies for Establishing and Implementing Total Maximum Daily Loads (TMDLs)" further provides: "It is now time to move towards the next stage of our strategy to achieve water quality standards – to make sure that TMDLs are established for all listed waters, and that the load allocations established by TMDLs are implemented by point and nonpoint sources alike."[12] The guidance continues by explaining that "reasonable assurances that the nonpoint source load allocations established in TMDLs (for waters impaired solely or primarily by nonpoint sources) will in fact be achieved. These assurances may be non-regulatory, regulatory, or incentive-based, consistent with applicable laws and programs."[13] To the same effect is EPA's 2002 document, "Guidelines for Reviewing TMDLs under Existing Regulations issued in 1991": For waters that are impaired by both point and nonpoint sources, "reasonable assurances that nonpoint source control measures will achieve expected load reductions [are required] in order for the TMDL to be approvable."[14]

EPA offered a similar explanation in 2009, as the Bay TMDL process gathered strength:[15]

> "When EPA establishes or approves a TMDL that allocates loads to both point and nonpoint sources, it determines whether there is a "reasonable assurance" that the nonpoint source load allocation will, in fact, be achieved and water quality standards be attained. EPA does this to be sure that the load allocations are not

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[10] *See* 1991 *Guidance* (emphasis added), EPA 440/4-91-001, at 6.
[11] *Guidelines for Reviewing TMDLs Under Existing Regulations Issued in 1992* (US EPA 1991a), http://www.epa.gov/owow/tmdl/guidance/final52002.html.
[12] *Id.*, at 1.
[13] *Id.*, at 6.
[14] "Guidelines for Reviewing TMDLs under Existing Regulations issued in 1991," at 5.
[15] *See* EPA correspondence to former Virginia Secretary of Natural Resources Preston Bryant, Jr., for the Chesapeake Bay Program Principals' Staff Committee (November 9, 2009), at 15.

> based on too generous assumptions regarding the amount of nonpoint source pollutant reductions that will occur. . . If the reductions embodied in load allocations are not fully achieved because of a failure to fully implement needed nonpoint pollution controls, the collective reductions from point and nonpoint sources will not result in attainment of the water quality standards."[16]

Moreover, the settlement agreement entered among the parties in *Fowler v. EPA* (Case No. 1:09-CV-00005-CKK, D.C. May 10, 2010) explicitly addresses the need for reasonable assurance in the development of the Bay TMDL – and EPA's obligation to ensure this essential element of the TMDL and WIPs is met. While the case dealt with the failure of EPA to sufficiently implement the provisions of the many Chesapeake Bay Agreements, including the *Chesapeake 2000* agreement, the settlement agreement obligated EPA to establish a TMDL that included a reasonable assurance and implementation framework that demonstrated "nonpoint source loading reductions will be achieved." *See* attached Settlement Agreement.

Voluntary Measures Do Not Provide Reasonable Assurance And Do Not Satisfy the Requirements of the CWA

The intent of the CWA is to actually clean the waters of the nation. The provisions dealing with the development and implementation of TMDLs are meant to accomplish the removal of waterways from the CWA impaired waters list. It is not the intent of the CWA that the TMDL provisions are to merely create mounds of paperwork explaining the condition and needs of waterways with no way to restore clean water.

The legislative history of the CWA, passed in 1972, demonstrates that the TMDL program was created as a means to correct the shortcomings of the Water Quality Act of 1965 – an Act that failed to provide any "reasonable assurances" that water quality standards would, in fact, be achieved. A TMDL is a tool to ensure the achievement and attainment of water quality standards. *See Environmental Defense Fund Inc. v. Costle*, 657 F.2d 275, 279 (D.C. Cir. 1981). The very futility of a voluntary program was the reason behind the enactment of the CWA. As the House committee stated, "America's waters are in serious trouble, thanks to years of neglect, ignorance, and public indifference." H. Rep. No. 92-911, at 66 (1972). In fact, the evidence suggesting that "purely voluntary" plans generally do not work is overwhelming.[17] Additionally, the futility of exclusively voluntary measures is routinely recognized by courts in the context of a number of environmental statutes. For example, in *Sierra Club v. EPA,* 99 F.3d 1551 (10th Cir. 1996), the Court held that before EPA could redesignate an area from non attainment to attainment under the Clean Air Act, it must "determine that the

[16] *Id.,* at 5. *See also* U.S. E.P.A. (2002),
[17] *See Putting the Pieces Together: State Nonpoint Source Enforceable Mechanisms in Context,* ELI Project No. 970302 (June, 2000).

improvement in air quality is due to permanent and enforceable reductions in emissions" and not to voluntary compliance measures. *Id.* at 1557; *See also Environmental Defense Fund v. EPA*, 167 F.3d 641, 656 (D.C. Cir. 1999) (*citing* CAA requirement that state implementation plans contain "enforceable control measures.").

Distrust of voluntary compliance is also evident in cases involving the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370e. To avoid having to prepare an environmental impact statement, agencies often outline future mitigation measures to be undertaken to lessen the impact of a particular project. To ensure that these proposed mitigation measures actually occur, courts routinely require more than mere voluntary compliance. There must be a guarantee that the proposed mitigation measures will be utilized. *See Cabinet Mountain Wilderness v. Peterson,* 685 F.2d 678 (D. C. Cir.1982) (Forest Service ensured that affirmative mitigation measures would occur); *Sierra Club v. Peterson*, 717 F.2d 1409, 1411 (D.C. Cir. 1983) (Stipulations attached to oil and gas leases were not adequate because while the Department of the Interior could impose conditions, they could not preclude the proposed activity.).

Further, in the context of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544 (1973), numerous courts have held "purely voluntary" programs to be inadequate because they offer no assurances that species protection will occur. *See Bennett v. Spear*, 520 U.S. 154 (1997) (ESA decisions may not be based on "speculation or surmise"); *Biodiversity Legal Foundation v. Babbitt*, 943 F. Supp. 23 (D.D.C. 1996) (Agency cannot use "promises of proposed future action" as an excuse); (*National Wildlife Federation v. Coleman*, 529 F.2d 359, 374 (5th Cir. 1976) (Reliance on proposed, unenforceable actions insufficient); *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987) (Corps violated ESA by relying on speculation that activities will occur); *Oregon Natural Resources Council v. Daley*, 6 F. Supp. 2d 1139 (D. Or. 1998) (Future, voluntary, and untested habitat measures are inadequate) (*citing Save Our Springs Legal Defense Fund, Inc. v. Babbitt*, Civ No. 96-168-CA (W.D. Tex. 1997) (Voluntary actions provide "no assurances that measures will be carried out."); *Natural Resources Defense Council v. U.S. Dept. of the Interior*, 113 F.3d 1121 (9th Cir.1997) (California's "purely voluntary program" offered "no substantive protection.").

In all of the above-mentioned cases, the courts have rightly been concerned that voluntary measures do not result in appreciable changes in environmental quality and do not reflect the intent of the scope of laws passed to protect and restore our environment. The same principles apply to the CWA, and specifically to TMDLs. The Bay TMDL must include the reasonable assurances that it will be achieved in order to meet the goals and requirements of the CWA.

The CWA Requires WIPs Specifically for the Chesapeake Bay Under Section 117

EPA's authority to require WIPs is further substantiated by Section 117 of the CWA which provides:

(g) Chesapeake Bay Program

(1) Management strategies

The Administrator, in coordination with other members of the Chesapeake Executive Council, shall ensure that management plans are developed and implementation is begun by signatories to the Chesapeake Bay Agreement to achieve and maintain –

(A) the nutrient goals of the Chesapeake Bay Agreement for the quantity of nitrogen and phosphorus entering the Chesapeake Bay and its watershed.

(B) the water quality requirements necessary to restore living resources in the Chesapeake Bay ecosystem; ...

33 U.S.C. § 1267(g)(1)(A)-(g)(1)(B). This section was re-codified as part of the Estuaries and Clean Water Act of 2000, Title II Chesapeake Bay Restoration. In recodifying this section, Congress stated that the purposes of the Act were to "(1) expand and strengthen cooperative efforts to restore and protect the Chesapeake Bay, and; (2) to achieve the goals established in the Chesapeake Bay Agreement." *Id.* Congress concluded that the mere development of a plan was not sufficient: the plan and implementation of it were to actually accomplish Bay agreement goals. Pub.L. 106-457, Title II, Sec. 202(b)(2), Nov. 7, 2000, 114 Stat. 1967.

Accordingly, Section 117(g) explicitly provides additional authority for the development of WIPs: the "management plans" which will achieve both the "nutrient goals" for the "quantity of nitrogen and phosphorus entering the Chesapeake Bay and its watershed" (i.e., the load and wasteload allocations of the TMDL) as well as the "the water quality requirements necessary to restore living resources in the Chesapeake Bay ecosystem" (i.e., the plan must actually lead to the achievement of the load and wasteload allocations).

EPA Has the Obligation to Enact Consequences
For Inadequate WIPs that Fail to Provide Reasonable Assurance

Unfortunately, none of the WIPs as originally submitted by the Bay jurisdictions provide reasonable assurance. In spite of the clear directives provided by EPA, EPA has concluded that all of the WIPs, to one degree or another, have failed to meet the test of reasonable assurances.[18] Others have reached the same conclusion. *See* Chesapeake Bay Foundation letters to EPA on the jurisdictional WIPs (for New York, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, and the District of Columbia), attached hereto and incorporated herein by reference.

[18] It is important to note that any ambiguities as to the EPA Administrator's powers under the Clean Water Act are to be resolved in his favor. *E.I. DuPont de Nemours & Co. v. Train*, 430 U.S. 112, 128-29, 97 S. Ct. 965, 975, 51 L. Ed. 2d 204 (1977); *Inland Steel Corp. v. EPA,* 574 F.2d 367, 373 (7th Cir. 1978).

If the TMDL is to accomplish its goal of clean water and removal of the Chesapeake Bay and its waters from the impaired waters list, and if the WIPs are insufficient implementation tools to do so, EPA has no alternative but to invoke consequences. EPA has identified these consequences in its letters of November 4, 2009, and December 29, 2009, both addressed to the members of the Principals' Staff Committee. The need for EPA action is similarly noted in the attached Settlement Agreement (*see* Section III. A. 4 and III. B.7).

Among the potential consequences is the withdrawal of delegation of a state's CWA permit program. Federal regulations provide the Administrator the authority to begin the process of withdrawal on her own initiative. 40 C.F.R. 123.64. An insufficient WIP, lacking reasonable assurances – that is, operating a delegated CWA program designed to maintain, not correct, the impairment of the Bay and its waters – is solid ground for withdrawal. *See* 40 C.F.R. 123.63 (Withdrawal may be based upon failure to promulgate or enact new authorities when necessary.).

EPA Needs to Play a Stronger Role in Governing Nutrient Trading and Offsets

For the last several years, CBF has been actively engaged in the development of the nutrient trading programs in Maryland, Virginia and Pennsylvania. The Chesapeake Bay TMDL provides a unique opportunity to demonstrate that a nutrient trading program, subject to strict oversight and carefully-crafted rules keyed to environmental performance targets, can help make a regulatory program function in a more economically efficient way. In particular, there is the potential for nutrient trading to help local governments comply with stormwater permits in a more cost-effective way and as a framework to account for, and offset, new loads of nitrogen and phosphorus resulting from growth and development.

As with other elements of the Chesapeake Bay Program, successful work on offsets and trading in the Chesapeake Bay could serve as a powerful model to consider in other watersheds. Unfortunately, substantial differences currently exist among the trading programs that have developed in the watershed states. This not only presents issues of inequity, but also will hamper efforts to establish an interstate trading program that could present even more opportunities for economic efficiency. Consequently, EPA needs to work to harmonize the state programs and use its oversight of the WIPs and of state-issued permits to ensure that offsets for new growth and trades to meet reduction targets operate by the same rules – rules that ensure transparency, accountability, scientific integrity, and consistency – among jurisdictions. *See* EPA guidance entitled "Guide for the Evaluation of Watershed Implementation Plans," dated April 2, 2010 and attached Settlement Agreement of May 10, 2010, specifically Section III.B.4.f and 11 (EPA oversight of offsets a specific obligation.)

EPA's Appendix S, "Offsetting New or Increased Loadings of Nitrogen, Phosphorous and Sediment to the Chesapeake Bay Watershed", and Section 10, TMDL Implementation and Adaptive Management, outline broad expectations for offset programs within and among Bay states. The use of a comprehensive set of definitions, common elements and program features that guide trading among both new and existing sources of nitrogen and phosphorous are necessary to further effectuate success. Clear, rigorous and consistent rules will help maintain the integrity of a trading system while fostering market clarity and stability. The principles outlined in Appendix S, in combination with many strong elements in EPA trading policies, must be implemented to ensure that trading contributes to, and does not undermine, progress toward meeting the TMDL goals.

In particular, EPA needs to play a strong and active role in defining "baseline." In this context, we are referring not only to the baseline that must be achieved before an entity can sell credits in the compliance market, but also the baseline for estimating new loads that need to be offset.

In the case of the former, EPA should require the states to demonstrate that their baseline for sellers equates to that entity's proportion of achieving the Bay TMDL. The current definition of baseline in Pennsylvania for agricultural producers would not meet this standard. EPA must establish a requirement for this demonstration from all states that wish to participate in nutrient trading. Furthermore, it is likely that the baseline will need to be a performance-based approach that requires a certain level of pollution reduction. This will provide greater flexibility in how achievement of the baseline occurs (when compared to a more prescriptive approach) and will ensure consistency with necessary pollution reduction targets.

In terms of setting the baseline for offsetting new loads, EPA action needs to reflect elements reflected in the policy document submitted by CBF in September in response to a request for informal comments on Appendix S. A copy of the document is attached and incorporated herein by reference.

Finally, EPA must lead efforts to harmonize accounting and verification systems for nutrient credits, including the establishment of a regional nutrient credit registry. *See* attached Settlement Agreement, specifically Section III.B.11. Currently, there are at least two calculation tools that are being used to estimate pollution loads from farms: "NutrientNet" developed by the World Resources Institute and the "Nutrient Load Estimator" developed by Water Stewardship Inc. Potentially, the loadings output from these two models may be different and this disconnect has the potential to add an unnecessary layer of confusion and skepticism to the nascent trading market. In collaboration with the Natural Resources Conservation Service, EPA must drive a consensus on the calculation tool as well as verification procedures for nutrient credits.

Conclusion

We have before us, the opportunity of a lifetime – to not repeat the failings and broken promises of the past, but rather chart a new course for Chesapeake Bay restoration. We encourage EPA to hold firm in the face of the opposition – those who would prefer to see the status quo, rather than real progress. Those that would prefer to criticize, rather than work for solutions. Those that would prefer to leave a legacy of polluted waters for our children rather than have the courage to take action.

Administrator Jackson, you and your agency have received literally thousands of letters from citizens across the Chesapeake Bay watershed, urging EPA to stand firm on the Bay TMDL. You have our sincere thanks for your strong leadership on the restoration of the Chesapeake Bay and its waters and, in particular, on the precedent-setting, and necessary, TMDL.

We look forward to continuing to work with EPA on the implementation of a strong, enforceable, accountable Bay TMDL.

Sincerely,

Roy A. Hoagland
Vice President, Environmental Protection and Restoration

Attachments

Copy:

The Honorable Shawn Garvin, Regional Administrator, EPA Region III

J. Charles Fox, EPA Senior Advisor on Anacostia and Chesapeake Bay

Jeffrey Corbin, EPA Region III

Robert Koroncai, EPA Region III

Richard Batiuk, EPA Chesapeake Bay Program Office

INVENTORY OF ATTACHMENTS

Fowler v. EPA, Notice of Intent, October 29, 2009

Fowler v. EPA, Complaint, January 5, 2009

Fowler v. EPA, Settlement Agreement, May 10, 2010

Chesapeake Bay Foundation Letter on New York WIP

Chesapeake Bay Foundation Letter on Pennsylvania WIP

Chesapeake Bay Foundation Letter on Delaware WIP

Chesapeake Bay Foundation Letter on Maryland WIP

Chesapeake Bay Foundation Letter on Virginia WIP

Chesapeake Bay Foundation Letter on West Virginia WIP

Chesapeake Bay Foundation Letter on District of Columbia WIP

Chesapeake Bay Foundation Recommendations for Calculating Offsets